EUPE Bangsar South Development (JV) Sdn Bhd v Lam Sai Yih

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCVC-200–07 OF 2021
MOHD NAZLAN J
18 APRIL 2022

Civil Procedure — Disposal of case on point of law — Appeal against a decision to summarily determine case — Whether case suitable for summary determination — Whether calculation of liquidated ascertained damages ('LAD') should be from the date of payment of booking fee or date of sale and purchase agreement — Whether acceptance of lower sum of compensation for LAD could be treated as a waiver to claim total compensation for LAD — Whether s 35(1) of COVID-19 Act exempted developer from paying compensation for LAD — Rules of Court 2012 O 14A — Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 35

This was an appeal against the decision of the sessions court which allowed the writ action to be dealt with by way of a hearing under O 14A of the Rules of Court 2012 ('the RC 2012') and against its subsequent determination of the three questions pursuant thereto. The appellant was a developer of a housing project. The respondent was the purchaser of a parcel ('the unit') which he bought for RM778,000 in pursuant of a sale and purchase agreement ('SPA'). Prior to the entry of the SPA however, on 19 December 2014, the respondent had paid RM10,000 to the appellant's solicitors as booking fee for the purchase of the unit. Vacant possession of the unit was then delivered by the appellant to the respondent on 26 June 2020. This was late delivery. Subsequently, the appellant made a payment sum as liquidated damages of RM7,417.64 to the respondent being compensation for late delivery of vacant possession of the unit, which was accepted by the respondent on 12 October 2020. On 22 February 2021, the respondent filed a claim at the sessions court claiming for liquidated ascertained damages ('LAD') amounting to RM134,796.49. He then filed the O 14A application to dispose of the case on the point of law, which was allowed by the sessions court. The questions which were raised for determination were: (a) the first question — whether the calculation of LAD should be from the date of payment of the booking fee or the date of the sale and purchase agreement. The sessions court answered that the calculation of LAD should be calculated from the date of payment of the booking fee; (b) the second question — whether the respondent's acceptance of RM7,417.64 as payment from the appellant could be treated as a waiver of the total compensation for LAD was answered by the sessions court in the negative; (c) the third question — whether s 35(1) of the Temporary Measures for

Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('COVID-19 Act') exempted the appellant from paying the compensation for LAD from 18 March 2020 until 31 August 2020 since vacant possession of the unit should have been delivered to the respondent before 17 March 2020 was also answered in the negative. The appellant was dissatisfied with this, hence the instant appeal.

Held, dismissing the appeal with costs:

(1) In this case, based on the facts disclosed by the pleadings and affidavit evidence, the sessions court was plainly able to determine the questions of law that such question or construction of documents could be resolved without a full trial. The three questions of law were formulated from the pleadings and affidavits, which the sessions court had correctly determined would be able to expedite the disposal of the suit and thus saved time and expenses which would otherwise have arisen should the suit proceed to full trial. Fundamentally, the determination of the three questions would not involve, let alone be dependent on the resolution of any dispute of material facts. As such, the challenge against the decision of the sessions court allowing the O14A application was lacking in merits (see paras 27–29).

(2) For the purpose of determining the LAD, the reference completion period in this case of 48 months for the delivery of vacant possession ought to be from the date of the booking fee payment (on 19 December 2014 when the respondent paid RM10,000 to the appellant), and not from date of the SPA of 18 February 2016. Booking fees refundability was irrelevant and of no consequence in the instant case even though the appellant characterised it as refundable. This was because the parties did proceed to execute the SPA, there was no issue of the respondent not securing a loan to finance the purchase, and the parties did as a matter of fact and law actually complete the SPA, with the only issue being the subsequent late delivery on the part of the appellant. Arguments about the refundability status of the booking fees served only to distract and obfuscate what was already a clear statement of the position in law. The sessions court was therefore correct in ruling that the first question of law was answered in the affirmative in that the calculation of LAD started running from the date of payment of the booking fee (see paras 34, 40–41 & 45).

(3) In the absence of any evidence to suggest that by the respondent's acceptance of the RM7,417.64, the respondent had intentionally foregone his full entitlement to the total LAD compensation for the delay in the delivery of vacant possession of the unit, there was absolutely no legitimate basis for the court to find the presence of any compromise reached between the appellant and respondent to have any legal

consequence to the effect that the respondent's acceptance of the RM7,417.64 should constitute a waiver of the total claim for LAD as compensation for the late delivery of the said unit. The sessions court was therefore correct in making the ruling that the second question of law was answered in the negative in that the respondent's acceptance of the said RM7,417.64 did not constitute a waiver of the respondent's right to claim full LAD compensation from the appellant (see paras 53–54).

(4) The learned judge readily agreed with the finding of the sessions court that the COVID-19 Act did not exempt the appellant from paying the full LAD sum to the respondent being compensation for the late delivery of vacant possession of the said unit. The reason was simply that vacant possession of the unit should have already been delivered to the respondent by 19 December 2018 that was patently before 18 March 2020 and before the COVID-19 Act had come into force. From the language of s 35 of the COVID-19 Act, the exemption period would only assist a developer if the contractual delivery date was due on a date that fell during the said period. The exemption period did not apply in the present situation where the developer had already failed to deliver as contracted by a date before the said exemption period. To adopt the interpretation ascribed by the appellant would not promote the law as a true instrument of justice especially given the resounding judicial acknowledgment of the HDA and HDR being social legislation designed to protect homebuyers. The law also could not allow the appellant to benefit from its own default (see paras 61 & 65–66).

(5) Since the delivery of the vacant possession date for the unit was on 26 June 2020 which was before the implementation of the COVID-19 Act, it would only be right that the appellant was not allowed to gain unfair advantage from the implementation of the COVID-19 Act to deny the respondent's full entitlement to the LAD attributed to the delay occasioned by the appellant. The sessions court was therefore correct in answering the third question of law in the negative as s 35(1) of the COVID-19 Act could not be read to exempt the appellant from paying the full LAD as compensation to the respondent for the late delivery of vacant possession of his unit, which included the period of approximately 100 days from 18 March 2020 until the actual date of delivery of vacant possession on 26 June 2020, when its contractual obligation under the SPA was to deliver before the stated exemption period (see paras 68–69).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan mahkamah sesyen yang membenarkan writ tindakan untuk diuruskan melalui cara pendengaran di bawah A 14A Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan terhadap penetuannya kemudian atas tiga soalan. Plaintif merupakan pemaju projek perumahan. Responden merupakan pembeli satu bidang (unit tersebut) yang

mana dibeli untuk jumlah RM778,000 selaras dengan perjanjian jual beli ('PJB'). Sebelum kemasukkan PJB, pada 19 Disember 2014, responden telah membayar RM10,000 kepada peguam perayu sebagai yuran tempahan untuk pembelian unit tersebut. Milikan kosong unit tersebut telah diberikan oleh perayu kepada responden pada 26 Jun 2020. Ini merupakan penyerahan lewat. Kemudiannya, perayu telah membuat pembayaran sebagai ganti rugi jumlah tertentu berjumlah RM7,417.64 kepada responden sebagai pampasan pemberian lewat milikan kosong unit tersebut yang telah diterima oleh responden pada 12 Oktober 2020. Pada 22 Februari 2021, responden telah memfailkan tuntutan di mahkamah sesyen menuntut ganti rugi jumlah tertentu (LAD) berjumlah RM134,796.49. dia telah kemudiannya memfailkan permohonan K14A untuk melupuskan kes tersebut atas isu undang-undang, yang dibenarkan oleh mahkamah sesyen. Persoalan yang ditimbulkan adalah: (a) persoalan pertama — sama ada pengiraan LAD septutunya daripada tarikh pembayaran yuran tempahan; (b) persoalan kedua — sama ada penerimaan responden terhadap RM7,417.64 sebagai pembayaran daripada perayu boleh diterima sebagai pengenepian jumlah pampasan LAD yang dijawab oleh mahkamah sesyen secara negatif; (c) persoalan ketiga — sama ada s 35(1) Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020 ('Akta COVID-19') mengecualikan perayu daripada membayar pampasan untuk LAD dari 18 Mac 2020 sehingga 31 Ogos 2020 memandangkan milikan kosong unit sepatutnya dibekalkan kepada responden sebelum 17 Mac 2020 turut dijawab secara negatif. Perayu tidak berpuas hati dengan perkara ini, oleh yang demikian, rayuan ini.

Diputuskan, menolak rayuan dengan kos.

(1) Dalam kes ini, berdasarkan fakta yang dikemukakan dari pliding dan keterangan afidavit, mahkamah sesyen secara jelas boleh menentukan persoalan undang-undang dan soalan atau penafsiran dokumen boleh diselesaikan tanpa perbicaraan penuh. Tiga persoalan undang-undang yang dibentuk daripada pliding dan afidavit, yang mana mahkamah sesyen telah secara betul tentukan boleh mempercepatkan penyelesaian guaman dan oleh yang demikian menjimatkan masa dan kos yang akan sebaliknya timbul sekiranya guaman tersebut diteruskan dengan perbicaraan penuh. Secara asasnya, penentuan tiga soalan tersebut tidak akan melibatkan, ataupun bergantung kepada penyelesaian apa-apa percanggahan fakta material. Oleh yang demikian, apa-apa cabaran terhadap keputusan mahkamah sesyen membenarkan permohonan K14A tidak bermerit (lihat perenggan 27–29).

(2) Untuk tujuan penentuan LAD, rujukan tempoh penyelesaian dalam kes ini adalah 48 bulan selepas penyerahan milikan kosong sepatutnya daripada tarikh pembayaran yuran tempahan (pada 19 Disember 2014 apabila responden membayar RM10,000 kepada perayu) dan bukannya

daripada tarikh PJB pada 18 Februari 2016. Fakta yang yuran tempahan tersebut boleh dipulangkan adalah tidak relevan dan tidak memberi kesan dalam kes ni walaupun perayu menyatakan ianya boleh dipulangkan. Ini adalah kerana pihak-pihak telah melaksanakan PJB, dan ianya bukanlah menjadi isu bahawa responden tidak medapatkan pinjaman untuk membiayai pembelian tersebut, dan pihak-pihak telah secara fakta dan undang-undang menyelesaikan PJB tersebut, dengan satu-satu isu merupakan penghantaran lewat pada pihak perayu. Hujahan mengenai status yuran tempahan yang boleh dipulangkan hanya mengalihkan perhatian dan mengelirukan apa yang merupakan pengataan jelas kedudukannya di sisi undang-undang. Mahkamah sesyen adalah betul apabila mendapati persoalan undang-undang pertama yang dijawab secara afirmatif dan pengiraan LAD bermula daripada pembayaran yuran tempahan (lihat perenggan 34, 40–41 & 45).

(3) Dengan ketiadaan apa-apa keterangan untuk mencadangkan bahawa penerimaan responden terhadap RM7,417.64, responden telah dengan sengaja mengenepikan kelayakkan penuhnya kepada jumlah pampasan LAD untuk kelewatan penyerahan milikan kosong unit tersebut, tiada apa-apa alasan sah untuk mahkamah untuk mendapati apa-apa kompromi telah dicapai antara perayu dan responden untuk mempunyai apa-apa kesan undang-undang yang membawa kesan kepada penerimaan responden terhadap RM7417.64 akan terjumlah kepada pengenepian jumlah tuntutan untuk LAD sebagai pampasan untuk penyerahan lewat unit tersebut. Oleh yang demikian, mahkamah sesyen adalah tepat dalam membuat dapatan bahawa persoalan undang-undang kedua dijawab secara negatif yang mana penerimaan responden jumlah RM7414.64 tidak terjumlah kepada satu pengenepian hak responden untuk membuat tuntutan penuh pampasan LAD terhadap perayu (lihat perenggan 53–54).

(4) Hakim terpelajar bersetuju dengan dapatan mahkamah sesyen bahawa Akta COVID-19 tidak mengecualikan perayu daripada membayar jumlah LAD penuh kepada responden sebagai pampasan untuk menyerahkan lewat milikan kosong unit tersebut. Alasannya adalah bahawa milikan kosong unit tersebut sepatutnya diserahkan kepada responden pada 19 Disember 2018 yang mana adalah sebelum 18 Mac 2020 dan sebelum Akta COVID-19 berkuatkuasa. Daripada bahasa s 35 Akta COVID-19, tempoh pengecualian hanya akan membantu pemaju sekiranya tarikh serahan kontraktual adalah pada tarikh yang jatuh sebelum tempoh tersebut. Tempoh pengecualian tidak terpakai dalam keadaan ini yang mana pemaju telahpun gagal untuk menyerahkan pada tarikh yang ditetapkan sebelum tempoh pengecualian. Untuk menggunapakai tafsiran yang diberikan oleh perayu tidak akan mempromosi undang-undang sebagai satu instrumen keadilan

terutamanya mengambil kira pengiktirafan kehakiman bahawa HDA dan KDR merupakan satu undang-undang sosial yang dibentuk untuk melindungi pembeli rumah. Undang-undang juga tidak membenarkan perayu untuk menerima manfaat daripada kegagalannya sendiri (lihat perenggan 61 & 65–66).

(5) Memandangkan tarikh penyerahan milikan kosong unit tersebut adalah pada 26 Jun 2020 yang adalah sebelum tarikh Akta COVID-19 berkuatkuasa, ianya hanyalah betul sekiranya perayu tidak dibenarkan untuk mendapatkan kedudukan yang tidak adil daripada pemakaian Akta COVID-19 untuk menafikan hak penuh responden kepada LAD yang berpunca daripada kelewatan yang disebabkan oleh perayu. Oleh yang demikian, mahkamah sesyen adalah tepat dalam menjawab persoalan undang-undang ketiga secara negatif yang mana s 35(1) Akta COVID-19 tidak boleh dibaca untuk mengecualikan perayu daripada membayar pampasan LAD secara penuh kepada responden untuk penyerahan lewat milikan kosong unitnya, yang mana adalah termasuk tempoh lebih kurang 100 hari daripada 18 Mac 2020 sehingga tarikh sebenar serahan milikan kosong pada 26 Jun 2020, apabila tanggungjawab kontraknya di bawah PJB adalah untuk menyerahkan sebelum tempoh pengecualian yang dinyatakan (lihat perenggan 68–69).]

Cases referred to

Bank Simpanan Nasional v Rudysham bin Abdul Raof [2016] MLJU 909; [2017] 4 CLJ 234, HC (refd)

Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals [2017] 4 MLJ 42; [2017] 5 CLJ 389, FC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31, FC (refd)

Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin [2018] 3 MLJ 354, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60; [2021] 2 CLJ 441, FC (folld)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)

Rugber Kaur Ajaib Singh v Ho Shee Fun & Anor [2011] MLJU 1551; [2011] 1 MLRA 256, CA (refd)

UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys

Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Yap Heng Sang v Mammoth Empire Land Sdn Bhd [2021] MLJU 2576; [2021] 1 LNS 2149, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 29
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989
Petroleum Development Act 1974
Prevention and Control of Infectious Diseases Act 1988
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 14A
Rules of Court 2012 O 14A
Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ss 7, 35, 35(1), (1)(b)

Gan Chong Chieh (with Hannah Patrick and Rachel Ng) (MahWengKwai & Assoc) for the appellant.
Eugene Khoo Yean Shern (with Tay Shieh Chin) (Yeoh Shim Siow & Lay Kuan) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This is an appeal against the decision of the sessions court which allowed the writ action be dealt with by way of a hearing under O 14A of the Rules of Court 2012 ('the RC 2012') and against its subsequent determination of the three questions pursuant thereto. At the end of the appeal hearing which was conducted via *Zoom* video technology, I dismissed the appeal and highlighted the main grounds for my decision. This judgment contains the full reasons for the same.

KEY BACKGROUND FACTS

[2] The appellant is the developer of the project known as 'Residensi Era Novum (Novum @ South Bangsar' in Kuala Lumpur. The respondent is the purchaser of a parcel thereat ('the Unit') which he bought for RM778,000 in pursuance of a sale and purchase agreement ('SPA') dated 18 February 2016.

[3] Prior to the entry of the SPA however, on 19 December 2014, the respondent had paid RM10,000 to the appellant's solicitors as booking fee for the purchase of the Unit, receipt of which was acknowledged by the appellant.

[4] The key terms of the SPA for present purposes include the following. Firstly, the appellant shall deliver vacant possession of the Unit to the respondent within 48 months from the date of the SPA as stipulated in cl 25(1) of the SPA; secondly, if the appellant fails to deliver vacant possession of the Unit to the respondent within the stipulated period of 48 months, the appellant shall be liable to pay to the respondent liquidated damages calculated from day to day at the rate of 10%pa of the purchase price from the date of expiry until the date the respondent takes vacant possession of the Unit pursuant to cl 25(2) of the SPA.

[5] Thirdly, the appellant shall let the respondent into possession of the Unit within 48 months and upon the issuance of a certificate of completion and compliance under cl 27(1); fourthly, if the appellant fails to complete the common facilities within 48 months then the appellant shall be liable to pay the respondent liquidated damages calculated from day to day at the rate of 10%pa of the last 20% of the purchase price pursuant to cl 29(2).

[6] Vacant possession of the Unit was then delivered by the appellant to the respondent on 26 June 2020 vide a notice of delivery of vacant possession of even date, after the appellant had obtained the certificate of completion and compliance for the project. This was late delivery. Subsequently, the appellant made a payment sum as liquidated damages of RM7,417.64 to the respondent being compensation for late delivery of vacant possession of the Unit, which was accepted by the respondent on 12 October 2020.

[7] On 23 October 2020, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act') was *gazetted*.

[8] On 22 February 2021, the respondent filed a claim at the sessions court claiming for liquidated ascertained damages (LAD) amounting to RM134,796.49. He then filed the O 14A application on 27 April 2021 to dispose of the case on the point of law, which was allowed by the sessions court on 17 June 2021. The appellant was dissatisfied with this, hence the instant appeal before me.

DECISIONS OF THE SESSIONS COURT ON THE O 14A APPLICATION

[9] The sessions court agreed on the formulation of three questions of law. The questions and the answers pronounced by the sessions court are as follows.

[10] The first question — whether the calculation of LAD should be from the date of payment of the booking fee or the date of the sale and purchase agreement? The answer given by the sessions court was the former.

[11] The second question — whether the respondent's acceptance of RM7,417.64 as payment from the appellant can be treated as a waiver of the total compensation for LAD was answered by the sessions court in the negative.

[12] The third question — whether s 35(1) of the COVID-19 Act exempts the appellant from paying the compensation for LAD from 18 March 2020 until 31 August 2020 since vacant possession of the Unit should have been delivered to the respondent before 17 March 2020 was also answered in the negative.

LAW ON APPELLATE INTERVENTION

[13] Before proceeding further, I should remind myself that in hearing this appeal, I am reminded of the function of this court for that purpose as established by case law authorities and have therefore proceeded approaching the same accordingly. The trite principle of law that an appellate court should be slow to interfere with the findings of fact of a trial judge cannot be emphasised enough (see for instance, the decision of the Court of Appeal in the case of *Rugber Kaur Ajaib Singh v Ho Shee Fun & Anor* [2011] MLJU 1551; [2011] 1 MLRA 256).

[14] The Federal Court in the case of *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 also observed as follows:

> [26] Thus, the prime issue in respect of questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of fact of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Watt or Thomas v Thomas* [1947] AC 484; *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309.

[15] At the same time, I am also mindful of s 29 of the Courts of Judicature Act 1964 which provides for all civil appeals to be done by way of a rehearing, noting that the decision being appealed against in the instant case concerns one not delivered after a full trial proceeding. Regardless, it is clear and worth reiterating that any intervention should be a judiciously measured response by an appellate tribunal, on the established principal grounds such as a wrong

application of the law or an insufficient judicial evaluation of the evidence (see for instance, the judgment of the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19).

EVALUATION AND FINDINGS OF THIS COURT

Suitability of O 14A proceedings

[16] The appellant argued that that this is not a case for summary determination based on O 14A, for it said that it is trite that an application for disposal of a case on point of law made under O 14A must be refused if there are serious disputes of facts involved.

[17] Reference was made by the appellant to the case of *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31 where the Federal Court held that where it is clear that there are disputes as to fact, the case should not be disposed of under O 14A. This the appellant submitted meant that the sessions court had erred in law by deciding that the case was suitable for disposal under point of law when there are serious disputes of facts involved.

[18] The respondent on the other hand contended that the sessions court committed no error in law or fact in determining the three questions of law under O 14A of the RC 2012 since the requirements thereunder have been satisfied.

[19] I agree.

[20] The provisions of O 14A of the RC 2012 read as follows:

14A Disposal of case on point of law

1 Determination of questions of law or construction (O 14A r 1)

(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.

2 Manner in which applications under rule 1 may be made (O 14A r 2)

An application under rule 1 may be made by a notice of application or, notwithstanding Order 32, rule 1, may be made orally in the course of any interlocutory application to the Court.

[21] There is no dispute that as established by the sessions court, all the aforesaid requirements have been met.

[22] It is useful to first refer to the principles governing the application of O 14A of the RC 2012. In *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 the Court of Appeal in clear fashion held:

12. In a nutshell, the order enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein. The order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of O 14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our O 14A. In *Korso Finance Establishment Anstalt v John Wedge* (unreported, February 15 1994 (CA) Transcript No 14/387), the English Court of Appeal laid down the following principles on the ambit of O 14A:

(1) An issue is 'a disputed point of fact or law relied on by way of claim or defence'.

(2) A question of construction is well capable of constituting an issue.

(3) If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

(4) Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might run up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, in the absence of such evidence the court should not refrain from dealing with the application (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/5).

13. In the same case, it was held:

> In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter ...

14. This position was followed by the Singapore Court of Appeal and the High Court when dealing with O 14 r 12 of the Rules of Court, our equivalent of O 14A, which recognised that resort to the procedure can be made to even where it does not dispose of the entire cause or matter (see *Payna Chettiar v Maimoon bte Ismail & Ors* [1997] 3 SLR 387; *Microsoft Corporation & Ors v Summit Holdings Ltd & Anor and other appeals* [1999] 4 SLR 529 and *Kamla Lal Hiranand v Harilela Padma Hari & Ors* [2000] 3 SLR 696). Order 14A should be read, inter alia, with O 14 (summary judgment) and O 18 r 19 (striking out pleadings and endorsements) (see *The Supreme Court Practice* 1999 Vol 1 para 14A/0/2) and O 14A r 1(5) of both our order and the English order provide that nothing in the order shall limit the powers of the court under O 18 r 19.

15 The principles established in the cases cited are of great persuasive force as they deal with similar provision of the civil procedure. Hence, we are inclined to follow them.

[23] In its analysis of the authorities on the subject, the Federal Court in *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31 later approved of the earlier decision of the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* which was decided under the previous O 14A of the Rules of the High Court 1980. These passages are especially pertinent:

> [26] Learned counsel for Petronas submitted that the decisions of the Federal Court on O 14A in cases referred to by learned counsel for the plaintiff do not depart from the *Terengganu*'s case and further, do not set up any new proposition of law. It was argued by learned counsel for Petronas that in *Dream Property* and *Thein Hong Teck* respectively, the Federal Court had decided that recourse to O 14A is unsuitable in the circumstances of those cases since there were serious dispute of facts involved, which can be distinguished from the present case. It was further argued that the Federal Court in *Bato Bagi* also made no critical remark on the decision in the *Terengganu*'s case. In this regard, the same stand was also taken by learned senior federal counsel for the second defendant.
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> [27] We are in agreement with the submission of learned counsel and senior federal counsel for Petronas and second defendant respectively that the decisions of the Federal Court on the application of O 14A in the three cases cited above do not in any way depart or steer away from the decision in the *Terengganu*'s case. In our view, the Court of Appeal in the *Terengganu*'s case did not attempt to lay down a hard and fast rule on the application of O 14A. The decision in the *Terengganu*'s case merely

stated some of the relevant factors which should be considered in dealing with an application under O 14A and they are not meant to be exhaustive. This view had already been expressed by Richard Malanjum CJSS in *Bato Bagi* which says:

> With respect, I do not think the Court of Appeal in *Petroleum Nasional Bhd* laid down a hard and fast rule for courts to comply with when confronted with applications under O 14A. All the Court of Appeal did was to state the relevant factors which should be considered and which in my view the relevant factors to consider are not exhaustive ...

[28] We share the same view as expressed in *Bato Bagi* above and we are unable to understand how the decision in that case can be said to have steered away from the decision of the Court of Appeal in the *Terengganu*'s case, as argued by counsel for the plaintiff.

[29] Meanwhile, *Dream Property* concerns the issue of the determination of delivery of vacant possession and the confirmation thereof pursuant to the special condition of a sale and purchase agreement entered into between the parties. In *Thein Hong Teck*, among the critical disputes were the issues of dissolution of a partnership before the filing of a petition for winding up and the preservation of rights of the partnership in respect of legal actions commenced before the dissolution of the partnership (as a result of the Federal Court order in one of the many suits filed in connection with the partnership). The issues in these two cases, as viewed by the Federal Court, were questions of facts which were seriously disputed between the parties and required to be determined in a full trial, to which the application of O 14A was held unsuitable in the circumstances of those cases. In addition, it is also to be noted that in *Dream Property*, there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration. By the above decisions, it is clear that the position of the law in an O 14A application is that where there are serious disputes of facts involved, it is inappropriate and unsuitable to have recourse to an O 14A procedure. In contrast, the Court of Appeal in the *Terengganu*'s case, after having carefully scrutinised the pleadings, concluded that the issues raised were purely legal issues based on the construction of documents which are suitable to be determined by the O 14A procedure. In our considered view, the facts and circumstances in the three cases above and in the *Terengganu*'s case, must be distinguished. The decisions of the Federal Court in those three cases did not change or set up any new proposition of law on the application of O 14A laid down in *Terengganu*'s case and therefore, we answer the first question posed in the affirmative.

...

[36] It is well settled that an issue is only suitable for determination under O14A if the points of law to be determined thereunder have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter (see *Allen v Gulf Oil Refining Ltd* [1980] QB 156 and *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd* [2008] 2 CLJ 686). The trial judge is therefore vested with the discretion to rely on the pleadings or to rely on affidavit evidence before him to determine whether the matter is suitable for determination without full trial of the action (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*). The plaintiff in its

statement of claim pleaded that the rights and ownership of petroleum, whether onshore or offshore belong to the plaintiff. The plaintiff contended that pursuant to the PDA and the Kelantan petroleum agreement signed between the plaintiff and Petronas, the plaintiff had freely and voluntarily relinquished to Petronas the ownership of all petroleum/land rights in good faith and for valuable consideration in the form of cash payments referred to in the PDA and the Kelantan petroleum agreement. The plaintiff further contended that it was not the intention of the plaintiff that ownership of its petroleum resources and the rights and privileges of exploiting, winning and obtaining petroleum onshore and offshore Kelantan would be vested without consideration or compensation, that is, as a gift to Petronas. In contrast, Petronas in its defence contended that the plaintiff's rights, if any, in respect of land or ownership of petroleum or the exploration, exploitation or winning of petroleum in any form is limited to three nautical miles adjacent to the coast of the State of Kelantan (its territorial waters). Petronas further contended that the plaintiff never possessed any rights of whatsoever nature in and over the sea and submerged land beyond the territorial waters off and the continental shelf adjacent to the coast of the State of Kelantan and in the circumstances, there is no liability on the part of Petronas to make payment claimed for by the plaintiff whether under contract or in law. Meanwhile, the second defendant in its defence contended that petroleum won and saved by Petronas in the continental shelf belonged to the second defendant and as such denied the plaintiffs rights to any cash payment in that respect.

[24] In this case of *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals*, the relevant statute was the Petroleum Development Act 1974 and the agreement involved was a petroleum agreement dated 9 May 1975 executed pursuant to the said Act. The Court of Appeal upheld the decision of the High Court for certain questions of law in the suit to be determined under O 14A. This was further affirmed by the Federal Court which in dismissing the appeal from the Kelantan State Government, being the plaintiff therein, determined from the pleadings that the core issue of the plaintiff's case was whether the plaintiff had any rights over petroleum won and saved in the continental shelf off its coast.

[25] More relatively recently, the Federal Court in *Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals* [2017] 4 MLJ 42; [2017] 5 CLJ 389 further affirmed this approach, and endorsed the commentary of a leading legal publication in the following terms:

> [35] On the applicability and the approach to be taken by the court in exercising its powers and discretion under O 14A, we refer to the commentary on O 14A appearing in the *Malaysian Court Practice* (Practitioner Edition), a publication of The Malayan Law Journal at pp 125–127 which reads as follows:
>
> > [14A.1.3.] Suitable question of law or construction The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be

determined under this order is *whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question.* The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see *Manganmal Jhamatmal Lalwani v NE Vickerama* [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue estoppel).

In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under O 14A rather than to allow it to go for trial. See *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at p 521, CA (construction of letter of credit). For the law as to construction, see *Prenn v Simmonds* [1971] 3 All ER 237.

The question of law or construction to be determined by the court under this order should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity or fictitious facts, about what is the question that has to be determined: *Allen v Gulf Oil Refining Ltd* [1979] 3 All ER 353. There must be no hypothetical or future facts: *Summer v William Henderson & Sons Ltd* [1963] 2 All ER 712, CA (no facts were agreed and what the outcome of the evidence was most uncertain). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal rulings in vacuo or on a hypothetical ruling, which the court will not do (see *State Bank of India v Marjani Marketing*, 1 March 1991, CA Transcript No 9/0304).

The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence. If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O 14A is inappropriate. The court should not be required to interpret the statement of claim to decide what point of law arises. An application under O 14A is to decide clear points of law or construction apparent on the pleadings (see *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* [1998] EWCA 3245, 22 July 1998 (CA)). (Emphasis added.)

[26] Based on the authorities on O 14A, a significant few of which are referred to herein, the key principles which may be stated on its application — which ultimately involves the exercise of judicial discretion — are as follows:

(a) the existence of a question of law is to be ascertained by reference to the facts disclosed in the pleadings and affidavit evidence, and once established, must be stated in clear and precise terms, *sans* any difficulty or obscurity, as the question of law or construction that the court is

A required to determine, and not be based on hypothetical or ambiguous facts;

(b) to be deserving of disposal on point of law, the question of law must be established to be suitable for determination without the full trial of the action and that such determination must also be shown to finally resolve the entire cause of matter or any claim or issue therein;

(c) a question of law is suitable to be determined under O 14A process if all the necessary and material facts relating to the subject matter of the question are not in dispute and if the court can determine the question of law without oral evidence by witnesses; and

(d) it is also not necessary for the entire case to be disposed of for it suffices if the determination resolves the substantial or dominant issue in the case.

[27] As such, in this case, based on the facts disclosed by the pleadings and affidavit evidence, the sessions court was plainly able to determine the questions of law that such question or construction of documents could be resolved without a full trial.

[28] The three questions of law, as set out above, are formulated from the pleadings and affidavits, which in my judgment the sessions court had correctly determined would be able to expedite the disposal of this suit and thus saving time and expenses which would otherwise arise should the suit proceed to full trial. Fundamentally, the determination of these three questions would not involve, let alone be dependent on the resolution of any dispute of material facts.

[29] As such the challenge against this decision of the sessions court allowing the O 14A application is lacking in merits.

The first question

[30] The sessions court answered that the calculation of LAD should be calculated from the date of payment of the booking fee. It is very clear why the sessions court determined this question in this manner. It is because the court is bound by a recent decision of the Federal Court in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441.

[31] The appellant however argued that *PJD Regency* should be distinguished. It was contended that the booking fee in *PJD Regency* is non-refundable which is not the case in the instant appeal. The line of argument is that in the event the respondent as potential purchaser decides not

to purchase the Unit or that if he fails to secure bank financing to fund the purchase, the booking fee is refundable to him. In that sense, the booking fee does not enter the equation of any offer and acceptance process such that there would be no valid contract at the time of the payment of booking fee.

[32] This therefore means, so the appellant contended, that the booking fee collected from the respondent is merely a practical mechanism for the mutual benefit of both parties to enter into the SPA, and at the same time afforded an interested purchaser such as the respondent the chance to select and to reserve a preferred unit in which event if the purchaser does not obtain any loans from the banks, the booking fee is refundable. A binding contract in this case only existed when the SPA dated 18 February 2016 was entered into between the appellant and the respondent. Consequently, the date of calculation of delivery of vacant possession should be from this date of 18 February 2016, not from the earlier date of payment of the booking fees of 19 December 2014.

[33] The appellant submitted that since the respondent had expressly agreed to the SPA, the period for delivery of vacant possession pursuant to cll 25(1) and 29(1) of the SPA shall be 48 months from 18 February 2016, that is, to be due on 17 February 2020. Therefore, the calculation of the LAD shall be for the period from 18 February 2020 until delivery date of 26 June 2020 (130 days), amounting to the sum of RM33,251.51.

[34] It cannot be disputed that based on *PJD Regency* however, for the purpose of determining the LAD, which by definition arises when there is a delay in the delivery of vacant possession, the reference completion period in this case of 48 months for the delivery of vacant position ought to be from the date of the booking fee payment (on 19 December 2014 when the respondent paid RM10,000 to the appellant), and not from date of the SPA of 18 February 2016. As such, since the 48 months ended on 18 December 2018, the delivery date of 26 June 2020 translated into a delay of 556 days.

[35] Further, in my judgment, the status of the refundability of the booking fee is of no consequence. It is now clear law that the calculation of LAD must be from the date of payment of the booking fee however it is described or whatever its refundability status, instead of from the date of the SPA. It is worth emphasising this recent development of the law following the landmark decision of the Federal Court in *PJD Regency* where Tengku Maimun CJ in delivering the judgment of the court lucidly explained as follows:

> [25] Accordingly, upon a wholesome and coherent reading of the two judgments of the Supreme Court in *Hoo See Sen* and *Faber Union*, the point of law at issue in these appeals remains very much decided. Where a developer fails to deliver vacant possession according to the time stipulated in the statutory sale and purchase agreement, the calculation of the LAD begins from the date of payment of the

booking fee and not from the date of that statutory agreement.

[26] In any event, we are of the view that the above point of law is further clarified and cemented by the nature of the HDA 1966 and HDR 1989 being social legislation. Thus, leaving aside the quarrel over the correctness of the two said Supreme Court decisions, we find that subsequent judicial decisions and legislative changes do not support the developers.

[36] It needs no reminding that the practice of requiring potential purchasers pay booking fees in advance of the execution of the statutory sale and purchase contracts is wrong. It is prohibited. And this was made clear in *PJD Regency*, where the Federal Court observed thus:

[45] Any doubt there may have been as regards this practice is now put to rest with the coming into force of the HDR 1989. Regulation 11 thereof which appears to have replaced reg 12 of the HDR 1982, provides as follows (prior to the 2015 amendment):

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

(2) *No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.*

(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller. (Emphasis added.)

[46] Regulation 11(2), as emphasised, very clearly stipulates and expressly provides for an absolute prohibition against the collection of booking fees howsoever they are called or described. Instead, the scheduled contracts now require that 10% of the purchase price be paid upon the signing of the sale and purchase agreement. Thus, speaking in ideal terms, if the law is strictly complied with, there is no question as to whether the date of calculation of the LAD runs from the date of payment of the booking fee or from the formal date of the agreement. This is because, the 10% deposit and the signing of the sale and purchase agreement would have been done simultaneously. Indeed, the statutory contracts for sale prescribe a specific payment schedule that must be complied with.

[47] The recent amendment to the HDR 1989 *vide* PU(A) 106/2015, to our minds, further cements the notion that the legislative framework has been further tightened to abrogate this practice of booking fees. Regulation 11(2) was amended to even stricter terms: everyone, not just developers, is prohibited from collecting booking

fees. The new reg 11(2) of the HDR 1989 reads:

> (2) No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale.

[48] In our view, the intention of Parliament is unequivocal. From the Hansard in 1966, to the change in the subsidiary legislation up to the amendment to the HDR 1989 in 2015, the written law in force has made it crystal clear that the collection of booking fees is to be absolutely prohibited.

[37] And I hardly need mention that by the doctrine of stare decisis, this High Court must follow the binding precedent created by these later decisions of the Federal Court. In this respect, the following observations of the Federal Court in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577, a case referred to by the appellant, are worthy of emphasis:

> [29] We are a country governed by the rule of law and thus finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment ...
>
> > [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short, the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called *stare decisis*. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of *stare decisis*, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

[38] It is observed that on the facts of this case, the respondent had paid RM10,000 to the appellant's solicitors on 19 December 2014 as booking fee for the purchase of the said Unit, which receipt was duly by the appellant. Applying *PJD Regency*, I would readily hold that the contract was formed as early as that date of 19 December 2014 when the respondent paid the booking fees of RM10,000 to the appellant.

[39] As such, the contractual obligation on the appellant to deliver vacant possession of the Unit to the respondent within 48 months fell on 19 December 2018 such that the LAD compensation for late delivery should rightfully be calculated from that date of 19 December 2018 until the actual date of vacant possession was delivered to the respondent. This, according to evidence involved a delay of some 556 days.

[40] Another reason why the status of the booking fees vis a vis its refundability is irrelevant is that it is of no consequence in the instant case even though the appellant characterised it as refundable. This is simply because the parties did proceed to execute the SPA, there was no issue of the respondent not securing a loan to finance the purchase, and the parties did as a matter of fact and law actually complete the SPA, with the only issue being the subsequent late delivery on the part of the appellant.

[41] In my view, arguments about the refundability status of the booking fees serve only to distract and obfuscate what is already a clear statement of the position in law in light of *PJD Regency.* It would also make no difference if like in this case it was contended that the booking fees sums were paid into a stakeholder account and was subjected to a certain terms and conditions. For all intents and purposes payments of booking fees was in fact made by the respondent in favour of the appellant before parties entered into the SPA for the Unit.

[42] As correctly submitted by the respondent, it is crystal clear that the Federal Court in *PJD Regency* has given effect to the legislative intent that the Housing Development (Control and Licensing) Act 1966 ('the HDA') and its ensuing subsidiary legislation — the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') are 'social legislation' such that in disputes between home buyers and housing developers, its significance lies in the approach taken by the courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power.

[43] Her Ladyship Tengku Maimun CJ instructively stated as follows:

> THE CONCEPT OF SOCIAL LEGISLATION
>
> [27] That the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute (see the decisions of the Federal Court in: *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232 and *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162).
>
> [28] The long title of a statute is relevant to its interpretation (see s 15 of the Interpretation Acts 1948 and 1967). The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.

[29] The social significance of the statute is further borne out by the words of Suffian LP in *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; [1982] CLJ 355; [1982] CLJ Rep 305 ('SEA Housing') at p 34 (MLJ); p 311 (CLJ):

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, *Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.* That was why r 12 was enacted and in particular paras (o) and (r) thereof. With respect we do not agree with Mr Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as clause 32 in this agreement. (Emphasis added.)

[30] It appears that even since 1982, housing developers have continued to devise ingenious, and if we may say so, devious schemes to overcome the protections afforded to purchasers by the scheme of the HDA 1966. We would say here that booking fees are one such invention. How is the concept of social legislation relevant to the weeding out of such practices?

[31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is 'social legislation'. A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687 ('Hoh Kiang Ngan').

[44] It further follows that in respect of the dispute in the instant case, where developers resorted to pre-contract booking fees mechanism — which is as stated above prohibited under the HDR — the date of the contract cannot be taken to mean the date printed in the SPAs, including the one executed by the respondent and appellant herein. Any act by the developers in attempting to bypass the statutory protections afforded to the purchaser cannot be countenanced by the court. Any amount of excuses offered as justification for the booking fee arrangement is futile when the HDA clearly states that the appellant is prohibited from collecting any payment prior to the signing of the sale and purchase agreement.

[45] The sessions court was therefore correct in making ruling that the first question of law is answered in the affirmative in that the calculation of LAD starts running from the date of payment of the booking fee.

The second question

[46] The sessions court answered the second question on whether the acceptance of RM7,417.64 as LAD by the respondent was to be construed as the full and final settlement of the LAD in the negative. The appellant said this is wrong, and that the learned sessions court judge erred in law and fact to find that the acceptance of the sum of RM7,417.64 is not a full and final settlement of the LAD.

[47] The appellant submitted that the respondent had accepted the said payment of the sum of RM7,417.64 as LAD on 12 October 2020 without protest such that the filing of the suit is an afterthought. The appellant referred to the case of *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin* [2018] 3 MLJ 354 where the Court of Appeal held that the conduct of accepting a payment from an appellant upon receipt of a letter dated 8 October 2020 without protest amounts to a finality.

[48] Not only that. The respondent also subsequently duly signed an acknowledgment receipt for the said payment, dated 12 October 2020 when accepting the sum of RM7,417.64 as the LAD. At all material times, the respondent never suggested to the appellant that his acceptance of the LAD payment was under protest until the date of filing of this suit at the sessions court.

[49] On a review of the appeal record, I am more inclined to agree with the findings of the sessions court that the payment of RM7,417.64 should not be construed to constitute to a waiver of the total compensation for LAD to which the respondent is entitled in respect of his unit.

[50] It is to be noted that quite apart from clear principle as observed by the Federal Court in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 that there can be no waiver in the absence of an intention to waive, of equal and crucial importance is the absence of any documentary evidence to the effect that the said payment of RM7,417.64 is to be treated as a waiver to the respondent's right to claim for total LAD compensation.

[51] The appellant made much of its letter dated 12 October 2020 addressed to the respondent where undeniably the respondent did pursuant thereto acknowledge receipt of the said payment. But that was as far as it went. By all accounts, the said letter did not specifically mention that such payment of RM7,417.64 shall be construed as full and final payment of the LAD being compensation for late delivery of the Unit to the respondent.

[52] In fact, in that same letter issued by the appellant dated 12 October 2020 nowhere is it stated that the sum of RM7,417.64 shall be construed as full and final settlement of the total LAD compensation sum due to the respondent. And even more so, neither did the same letter indicate that the respondent's rights in claiming full LAD compensation shall be forfeited or waived upon the acceptance of the sum of RM7,417.64 by the respondent.

[53] In the absence of any evidence to suggest that by the respondent's acceptance of the RM7,417.64, the respondent had intentionally foregone his full entitlement to the total LAD compensation for the delay in the delivery of vacant possession of the Unit, there is absolutely no legitimate basis for the court to find the presence of any compromise reached between the appellant and respondent to have any legal consequence to the effect that the respondent's acceptance of the RM7,417.64 should constitute a waiver of the total claim for LAD as compensation for the late delivery of the said Unit.

[54] The sessions court was in my judgment therefore correct in making the ruling that the second question of law is answered in the negative in that the respondent's acceptance of the said RM7,417.64 does not constitute a waiver of the respondent's right to claim full LAD compensation from the appellant.

The third question

[55] The answer to the third question of law is also pronounced by the sessions court to be in the negative. This is where the learned sessions court judge ruled that s 35(1) of the COVID-19 Act does not exempt the appellant from paying the compensation for LAD for the period between 18 March 2020 and 31 August 2020 since the vacant possession of the Unit should have been delivered by 17 March 2020. It was determined that the late delivery of vacant possession started to run from 19 December 2018 which is the lapse of 48 months since the date of payment of the booking fees (on 19 December 2014, as discussed earlier) such that the expected date of delivery does not come within the exemption period provided under the COVID-19 Act.

[56] The appellant however maintained that this is erroneous. It asserted that the period from 18 March 2020 (the very first day of the movement control order enforced nationwide) to 31 August 2020 as set out in the COVID-19 Act should be excluded from the calculation of the liquidated damages for the failure of the developer to deliver vacant possession.

[57] I think reference to the relevant provision of the COVID-19 Act is apposite. This is contained in s 35(1) which reads as follows:

(1) Notwithstanding any agreement entered into between the purchaser and the developer, the period from 18 March 2020 to 31 August 2020 shall be excluded from the calculation of —

(a) the time for delivery of vacant possession of a housing accommodation; and

(b) the liquidated damages for the failure of the developer to deliver vacant possession of a housing accommodation.

[58] Based on the above provision, the appellant argued that the answer of the sessions court is wrong by stating that since the actual date for delivery of vacant possession was on 19 December 2018 which was before the COVID-19 Act came into force, the appellant could not avoid paying the full LAD sum. The appellant argued that the actual delivery of the vacant possession of the Unit was on 26 June 2020. *PJD Regency* has no bearing on s 35(1)(b) of the COVID-19 Act because *PJD Regency* concerns the calculation of the LAD should begin from the date of the booking fee payment. *PJD Regency* did not decide on the applicability of the COVID-19 Act should vacant possession be delivered before the COVID-19 Act comes into force.

[59] The appellant contended that based on s 35(1) of the COVID-19 Act, the due date of delivery of vacant possession is immaterial in its application. The provision specifically provides that the period between 18 March 2020 and 26 June 2020 should be exempted from the calculation of the LAD regardless of when the due date of delivery of vacant possession was. Most of the agreements and the corresponding contractual dates of delivery of vacant possession affected by the COVID-19 pandemic would fall before the COVID-19 Act came into force. It is therefore, according to the appellant, absurd to interpret s 35(1) of the COVID-19 Act to mean that it should only apply to due dates for delivery of vacant possession after the COVID-19 Act came into force. As such, the respondent should only be entitled to claim LAD from 18 February 2020 until 17 March 2020 (29 days) amounting to RM7,417.64.

[60] The appellant also argued that the determination of whether the period between 18 March 2020 and 26 June 2020 should be exempted from the calculation of LAD pursuant to s 35 of the COVID-19 Act should not be disposed of by way of O 14A but only be determined in a full trial.

[61] I have to agree with the contrary position taken by the respondent. I would readily agree with the finding of the sessions court that the COVID-19 Act does not exempt the appellant from paying the full LAD sum to the respondent being compensation for the late delivery of vacant possession of the said Unit. The reason is simply that vacant possession of the Unit should have

already been delivered to the respondent by 19 December 2018 that was patently before 18 March 2020 and before the COVID-19 Act came into force.

[62] As discussed and found earlier, the contractual date for the appellant to deliver vacant possession of the Unit to the respondent following *PJD Regency* was by 19 December 2018. As such, the LAD compensation for late delivery should be calculated from that contractual date of 19 December 2018 until the actual date vacant possession was delivered to the respondent, specifically on 26 June 2020.

[63] This is the case even though it is not denied that the actual date when vacant possession of the said Unit was in fact delivered to the respondent on 26 June 2020 — a date within the exemption period stated in s 35 of the COVID-19 Act. Vacant possession in this case it should be reiterated ought to have been delivered by 19 December 2018 which was even before the COVID-19 Act came into force and also well before the start of the said exemption period.

[64] It bears emphasis that given that the contractual date for the appellant to deliver vacant possession fell (which the appellant was contractually obligated to honour) on a date which was way well before 18 March 2020 stipulated in s 35 of the COVID-19 Act, the appellant surely cannot now seek to rely on the said provisions in the COVID-19 Act which do not at all help its case.

[65] In my view, from the language of s 35 of the COVID-19 Act, the exemption period would only assist a developer if the contractual delivery date is due on a date that falls during the said period. Not in a situation like presently where the developer has already failed to deliver as contracted by a date before the said exemption period. Although no authorities were cited by counsel, a similar interpretation on s 35 of the COVID-19 Act may be found in the decision of the High Court in *Yap Heng Sang v Mammoth Empire Land Sdn Bhd* [2021] MLJU 2576; [2021] 1 LNS 2149.

[66] As such in my judgment, to adopt the interpretation ascribed by the appellant would also not promote the law as a true instrument of justice especially given the resounding judicial acknowledgment of the HDA and HDR being social legislation designed to protect homebuyers. The law also cannot allow the appellant to benefit from its own default. In *Bank Simpanan Nasional v Rudysham bin Abdul Raof* [2016] MLJU 909; [2017] 4 CLJ 234, I had stated thus:

NO BENEFIT FROM OWN DEFAULT

A [88] It is also my finding that the appellant is additionally subject to the trite principle of law that a party cannot benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1.

[67] Moreover there is, in any event, nothing to suggest that the delay was the result of the appellant suffering from any inability to perform its contractual obligation arising from the SPA due to the measures prescribed under the Prevention and Control of Infectious Diseases Act 1988 such as the imposition of the movement control order to prevent the spread of COVID-19, within the contemplation of s 7 of the COVID-19 Act.

[68] Furthermore, since the delivery of the vacant possession date for the Unit was on 26 June 2020 which is before the implementation of the COVID-19 Act, it would only be right that the appellant not be allowed to gain unfair advantage from the implementation of the COVID-19 Act to deny the respondent's full entitlement to the LAD attributed to the delay occasioned by the appellant.

[69] The sessions court was therefore correct in answering the third question of law in the negative as s 35(1) of the COVID-19 Act cannot be read to exempt the appellant from paying the full LAD as compensation to the respondent for the late delivery of vacant possession of his Unit, which included the period of approximately 100 days from 18 March 2020 until the actual date of delivery of vacant possession on 26 June 2020, when its contractual obligation under the SPA was to deliver before the stated exemption period.

CONCLUSION

[70] For the above-stated reasons, the decision of the sessions court is affirmed, and this appeal dismissed, with costs to the respondent.

Appeal dismissed with costs.

Reported by K Selvaraju